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No. 86-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, OLD REPUBLIC INSURANCE COMPANY and JEWELL RIDGE COAL CORPORATION,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, GLENN CORNETT, LUKE R. RAY, GERALD R. STAPLETON and WESTMORELAND COAL COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE NATIONAL COAL ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

BRIEF OF THE NATIONAL COAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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The National Coal Association ("NCA") respectfully moves, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari of Mullins Coal Company, Incorporated of Virginia, *et al.*, in the above-captioned case. Counsel for Petitioners, the Solicitor General, and Westmoreland Coal Company have given written consent for the filing of this brief *amicus curiae* while the remaining parties have not responded.

NCA is a trade association whose members own or operate approximately fifty percent of the nation's coal-producing capacity.

NCA's attached brief provides more detail concerning its interest in the disposition of this case as well as arguments in support of the Petition for Writ of Certiorari. Accordingly, NCA respectfully moves for leave to file this brief *amicus curiae*.

Respectfully submitted,

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Amicus curiae National Coal Association respectfully submits that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered herein on February 26, 1986 in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, should be granted.

INTEREST OF *AMICUS CURIAE*

The National Coal Association ("NCA") is a trade association comprising approximately 125 members. Its coal-producing members account for approximately fifty percent of the nation's coal production. In addition to coal-producing companies, the National Coal Association's membership includes coal brokers, equipment suppliers, coal transporters, consultants, and resource developers.

All U.S. coal producers share the cost of benefits payable to eligible persons under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act"). Benefit awards are payable either by an individual coal mine operator in certain cases, 30 U.S.C. §§ 932-933, or by the Black Lung Disability Trust Fund ("BLDTF" or the "Fund") in others, 30 U.S.C. § 934. The Fund is financed by a producer tax on coal, 26 U.S.C. §§ 4121, 9501, and is administered by the Secretaries of Labor, Treasury, and Health and Human Services, 26 U.S.C. § 9501(a)(2).

NCA producer members operate in every coal region of the United States. A number conduct mining operations only in states within the Fourth Circuit. Others operate in states within the federal circuits whose decisions conflict with the Fourth Circuit on the questions presented in the Petition. Yet others operate mines not only within the jurisdiction of the Fourth Circuit but also in states within the federal circuits whose decisions conflict with the Fourth Circuit on the questions presented.

The decision of the Court of Appeals will, therefore, affect NCA producer members both in their capacity as individual black lung litigants and as BLDTF taxpayers.

Regardless of where their operations are located, all NCA producer members are affected by the uncertainty in the law arising from the inability of the courts of appeals to agree upon the correct rules of proof and evidence in

black lung claims litigation. All mine operators that may be individually liable for claims arising within the Fourth Circuit are concerned that the Court of Appeal's holding will deeply undermine their ability to defend claims and will deprive them of the fair and equal treatment properly accorded all parties in Administrative Procedure Act litigation.

As BLDTF taxpayers, the nation's coal producers currently pay an excise tax of $1.10 per ton of underground-mined coal and $.55 per ton of surface-extracted coal.[1] This tax originated in the Black Lung Benefits Revenue Act of 1977[2] and has been increased by 120% in two amendments.[3]

The BLDTF is the sole source of benefits in claims which do not involve the liability of individual mine operators. This Fund has remained insolvent since its inception. Any increased disparity between revenues and benefit outlays can only exacerbate the Fund's tenuous economic stability achieved by temporary tax increases enacted by the Congress just this year, *see* note 1 *supra*. The Fourth Circuit's holding, which in practical terms will confer benefit of the Act's most powerful vehicle for entitlement on thousands of claimants on the basis of *ex parte* proof, can only serve to further destabilize the Fund's economic position. History teaches that yet further tax increases would be sure to follow.

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[1]26 U.S.C. § 4121(a)-(b), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, §13203(a), (d), 100 Stat. 312-13 (Apr. 7, 1986) ("1986 BLDTF amendment"). This amendment applies to sales after March 31, 1986.

[2]Pub. L. No. 95-227, § 2(a), 95 Stat. 11 (Feb. 10, 1978).

[3]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102, 95 Stat. 1635 (Dec. 29, 1981); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), 100 Stat. 312 (Apr. 7, 1986).

ARGUMENT

THE QUESTION PRESENTED IN THE PETITION IS OF GREAT IMPORTANCE TO THE COAL MINING INDUSTRY OF THE UNITED STATES

1. The Financial Viability of the Fund is Placed in Jeopardy by the Fourth Circuit's Decision in *Stapleton v. Westmoreland Coal Co.*

The Fourth Circuit en banc in *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424 (4th Cir. 1986), has issued a decision that restructures the rules of evidence and procedure under the Act; these rules have been applied for almost 15 years in hundreds of thousands of claims.

The Court of Appeals held that black lung claimants seeking to invoke the key presumption of eligiblity for benefits in 20 C.F.R. § 727.203 (1986) will do so as a matter of law by presentation of any supporting evidence whether or not such evidence is credible or reliable, or the fact to be found on the basis of it is supported by a preponderance of the relevant evidence.

The Secretary of Labor has, heretofore, not followed the single-item-invocation rule of *Stapleton* in evaluating claims for payment by the BLDTF. The majority of pending claims that could result in payment from the BLDTF were filed between June 30, 1973 and April 1, 1980 and will be adjudicated under the 20 C.F.R. § 727.203(a) presumption, 30 U.S.C. § 902(f)(2). Many of these pending BLDTF claims arise in the Fourth Circuit, which includes within its jurisdiction the major coal mining states of Virginia and West Virginia.

If *Stapleton* is not reviewed and reversed by this Court, the Secretary of Labor will be obligated to apply the inequitable single-item-invocation rule in the sizeable

number of Fourth Circuit cases to be paid from the BLDTF. The effect on the BLDTF could be devastating.

The Fund has collected over $3.403 billion in tonnage taxes from coal producers since 1978.[4] For Fiscal Year 1986 (through August 31, 1986), the nation's coal producers have paid over $461,992,000 into the BLDTF.[5]

Despite these substantial tax revenues, there has been a continuing imbalance between black lung payments and the income from the producer tax. The BLDTF has paid out over $4.930 billion in compensation since 1978, and $1.032 billion in interest on the advances as accumulated.[6] In Fiscal Year 1986, the BLDTF will disburse over $632 million.[7] To meet the shortfall between tax revenues and compensation expenditures, the BLDTF has had to be augmented by appropriations from the general treasury each year since its inception in 1978. The Fund has received $2.83 billion in advances from the U.S. Treasury to cover this imbalance.[8] In Fiscal Year 1986 (through August 31, 1986), the BLDTF has received a total advance

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[4]Information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Department of Labor, in a telephone interview with Bruce Watzman, NCA (Sept. 26, 1986).

[5]U.S. Department of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Aug. 1986) (available through the Treasury Department).

[6]These figures were also supplied by Mr. DeMarce, *see* note 4 *supra*. The discrepancy between income to the Fund and benefit outlays in all likelihood reflects the costs of administering the BLDTF.

[7]These figures were also supplied by Mr. DeMarce, *see* note 4 *supra*.

[8]*Id.*

from the general treasury of over $50 million.[9] These advances must be repaid at some time in the future by the BLDTF to the general treasury with interest.[10] 26 U.S.C. § 9501(c), (d)(4).

Under a 1981 amendment to the Internal Revenue Code,[11] the tonnage tax is to revert to the 1978 rate of $.50/ton (underground) and $.25/ton (surface) by January 1, 1996, or when there is no balance of repayable advances and interest due the BLDTF, whichever date is earlier.[12] As noted above, current debt for the BLDTF from prior advances and interest is over $2.8 billion, and the ability of the Fund to achieve solvency by 1996 is questionable, even under pre-*Stapleton* conditions.[13] The Fund's condition will be far more unpredictable unless *Stapleton* is reviewed and reversed by this Court.

[9]U.S. Department of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Aug. 1986) (available through the Treasury Department).

[10]The 1986 BLDTF amendment placed a five-year moratorium on interest accruals with respect to repayable advances to the BLDTF, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (Apr. 7, 1986).

[11]Pub. L. No. 97-119, § 102(a), 92 Stat. 1635 (Dec. 29, 1981).

[12]26 U.S.C. § 4121(e), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(c), 100 Stat. 313 (Apr. 7, 1986).

[13]In support of the Administration's recent proposal to increase the tax by 50%, the Department of Labor informed the Congress that "unless the present rates of the coal excise tax are increased this deficit could reach $30 billion by 2010." H.R. Rep. No. 241, 99th Cong., 2d Sess., pt. 1 at 75-76, *reprinted in* 1986 U.S. Code Cong. & Admin. News 653-54.

2. The American Coal Industry, Already in a Financially Vulnerable Condition, Could be Severely Injured By Imposing a Further and Unwarranted Burden on the Coal Producer

If *Stapleton* is not reviewed and reversed by this Court, the Labor Secretary, administrative law judges, and the Benefits Review Board will be obligated to apply the single-item-invocation rule of *Stapleton* in the sizeable number of Fourth Circuit cases potentially to be paid from the BLDTF.[14] The entitlement burden of the already-precarious BLDTF will then increase, thereby postponing reversion of the producer tax to the 1978-level of $.50/$.25 per ton and compelling more repayable advances from the general treasury. Clearly, delay in reversion of the black lung excise tax – or enactment of another tax increase – combined with the immediate effect of the Fourth Circuit's holding in claims involving direct mine operator liability would further erode the already marginal unit price advantage of coal over other fuels, and would impede marketing of long-term coal supply contracts.

It is of considerable significance that the Congress has devoted much effort toward striking a reasonable balance between the Fund's benefit payment obligations and the capability of the coal industry to meet them. In rejecting a 1985 Administration proposal to increase the coal tax by 50%, the Congress took great pains to enact a much smaller (10%) compromise tax increase which, it was hoped, would accommodate the competing demands of the Fund and the

[14]The BLDTF may also be subject to assertion of *Stapleton* by previously denied claimants who had not perfected appeals to the Benefits Review Board or the U.S. Court of Appeals. These claimants could conceivably argue that their apparently closed claims should be reopened and reviewed pursuant to the invocation rule in *Stapleton*.

pressing financial realities facing the coal industry.[15] Senator Heinz, an advocate of compromise, stated on the Senate floor:

> The additional tax increase proposed by the Ways and Means Committee, would exacerbate this alarming trend. A significant increase in the black lung excise tax would contribute to the loss of both domestic and international markets for [the] coal industry. Because we on the Finance Committee recognized the impact a large coal tax increase would have on the coal industry, we opposed the tax . . . .
>
> . . . .
>
> . . . However, I believe that it is possible for the conferees to find a compromise . . . .

131 Cong. Rec. S15,479 (daily ed. Nov. 14, 1985) (remarks of Sen. Heinz).

Indeed, the Congress' concerns are well founded. An independent study conducted for, but not controlled by NCA, highlighted the difficulties facing the coal industry:

> [T]he once characteristic rapid growth of the coal industry has slowed to a modest 1.8 percent annual rate over the past five years.
>
> Competitive pressures from alternative fuels, primarily oil and gas, have resulted in significant productivity increases *and a slow decline in the real price of coal.* During the period from 1978 to 1983, productivity rose 41 percent, reflecting results from more efficient mining techniques and

[15] *See, e.g.*, 131 Cong. Rec. S15,477-80 (daily ed. Nov. 14, 1985). In particular, see the remarks of Senator Warner, 131 Cong. Rec. S15,478 (daily ed. Nov. 14, 1985). *See also* the BLDTF amendment, Pub. L. No. 99-272, § 13203(a), (c), 100 Stat. 312-13 (Apr. 7, 1986).

> heavy capital investment in more efficient production equipment. Employment, however, fell dramatically over the same time period . . . from 224,203 in 1979 to 173,543 in 1983. Current employment is estimated to be approximately 175,000. . . .
>
> International competitive pressures are also playing a major role in the domestic coal market. . . . In four years, total tonnage of coal exported from the United States dropped nearly 28 percent.[16]

The Fourth Circuit's holding will substantially increase the rate of awards in the many thousands of claims arising within the Circuit. This, in turn, can only upset the expectations of both the Congress and the coal industry reflected in the carefully structured funding mechanism agreed upon in 1986. The industry is in no position to absorb these added liabilities and we are certain that the Congress harbored no intent or expectation that they would be newly imposed at this late date.

3. The Issue is in a Proper Posture for Consideration By the Court

This Court's authoritative guidance is needed to resolve the conflicting views of the circuits, to restore consistency in black lung claims litigation, and to preserve the intent and expectations of the Congress and claim litigants. The Petition for Writ of Certiorari provides an appropriate vehicle for delivery of that guidance. It presents the issues clearly and in an uncomplicated factual setting.

[16] Price Waterhouse, *The Economic Impact of the President's Tax Reform Proposals on the Coal Industry, Final Report* 3 (Sept. 1985) (emphasis added).

CONCLUSION

The members of NCA urge the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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